IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10725 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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SURESHBHAI BABUBHAI SUNARA

Versus

AHMEDABAD DISTRICT CO-OP. BANK LTD.

Appearance:

1. Special Civil Application No. 10725 of 2001

MR MM TIRMIZI for Petitioner No. 1-117

Mr.K.G.Vakharia, Sr.Counsel with

MR TUSHAR MEHTA for Respondent No. 1

Mr.Dabhi, AGP for Respondent No. 2

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 01/07/2002

ORAL JUDGEMENT

Rule. Mr.K.G.Vakharia, Ld.Sr.Counsel appearing for Mr.Tushar Mehta for the respondent No.1 waives service of rule on behalf of respondent No.1 and

Mr.Dabhi, Ld.AGP appears and waives service of rule on behalf of respondent No.2. With the consent of parties matter is taken up for final hearing today.

2. The present petition is preferred by the petitioners who are claiming to be the members of Vatva Kadamgiri Coop.Hsg.Society Ltd (hereinafter referred to as "the society") against the order dated 17.8.01 passed by the Gujarat State Cooperative Tribunal (hereinafter referred to as "the tribunal") in Lavad Appeal No.68/00.

3. The short facts of the case are that the petitioners are the members of Vatva Kadamgiri Coop.Hsg.Society Ltd. The case of the petitioners is that the erstwhile organiser and the developer of the society, namely, Naranbhai Pandya and others had obtained the loan of Rs.18,13,000/- from the respondent No.1-Bank, and the further case of the petitioners is that the erstwhile Organiser had the dummy members in the society. It is the case of the petitioner that they have become members of the society in the year 1990 whereas the loan was taken in the year 1981-85. It is further alleged by the petitioners that when the recovery notice came to be issued only they came to know that one Lavad Suit No.494/96 is filed by the respondent No.1-Bank for the recovery of loan amount and in the said lavad suit exparte judgment and award has been passed by the learned Nominee. The case of the petitioners is that 117 out of 159 members of the society filed Restoration Application No.187/97 before the learned Nominee and in the said application for restoration on 3.10.1997 learned Nominee passed the order whereby the operation of the award was stayed on condition of depositing a sum of Rs.11 lacs.

4. It is the contention of the petitioners that it was beyond the capacity of the petitioners to deposit the said amount and therefore the petitioners had preferred Special C.A.No.8971/97 before this court and the said petition came to be disposed of as per the order dated 31.1.01 by observing that the petition is preferred without exhausting the alternative remedy and it was also further observed by this court that the petitioners are at liberty to file appeal or revision application within two weeks for redressal of their grievance and in case such appeal or revision is preferred by the petitioner-society before the tribunal, the tribunal will decide the same on merits in accordance with law without going into the question of limitation within a period of one month thereafter. However, it is the contention of the respondent No.1 that the said petition was preferred by the society and not the petitioners herein.

5. The petitioners thereafter appear to have preferred Appeal No.68/00 before the Tribunal and the tribunal as per order dated 17.8.01 dismissed the appeal mainly on the ground that there is no application for leave to prefer appeal and therefore the appeal can not be entertained on merits. It is this order dated 17.8.01 passed by the tribunal which is under challenge in this petition.

6. Before the contentions of the rival parties are examined, it is worthwhile to mention that to test the bonafides of the petitioners, this court had passed an order on 23.4.02 directing the petitioners to deposit Rs.1500/- each and it is reported that baring 5/6 petitioners rest of the petitioners have deposited the amount which virtually comes to Rs.1 lac. The contention of the petitioners is that they are the members who are directly affected by the outcome of the award and therefore there was right to prefer the appeal. However, it is fairly stated that application for leave to appeal could not be submitted and it is further contended that when this court had passed order on 31.1.2001 the appeal was to be decided on merits and therefore the petitioners have approached this court against the order of the tribunal.

7. On behalf of respondent No.1 Bank, Mr.K.G.Vakharia, Ld.Sr.Counsel submitted that since there was no leave to prefer appeal the question of considering the same does not arise. Mr.Vakharia also submitted that in any event it was the society which had taken the loan and the appeal can be preferred by the society only and not by the members since there is no privity of contract between the members of the petitioner-society and the bank. Mr.Vakharia also submitted that the petitioners are not entitled to any benefit of the order dated 31.1.01 passed by this court in Spl.C.A.No.8971/97 because the same was not preferred by the petitioners, but was preferred by the society. Mr.Vakharia has relied on the judgment of the Apex Court in the matter of Daman Singh vs State of Punjab reported in AIR 1985 SC 973 in support of his contention that the members individually have no right to make any grievance. Mr.Vakharia also relied on the judgment of this court dated 25.1.00 in LPA No.190/95 in Spl.C.A.Nos.3027/91 in support of his contention that there is no privity of contract between the members of the petitioner society and the Bank, and therefore, the members can not make any grievance. Mr.Vakharia also relied on the judgment of this court in the matter of Thakor Jamasherkhanji Tajkhanji vs Rajgor

G.V. reported in 1998(1) GLH 717 to contend that even for leave to defend the conditions precedent must be satisfied, which, in his submission, were not satisfied in the present case. Of course, he also submitted that since there was no application for leave to defend there was no question of considering the said appeal.

8. Keeping in view the aforesaid rival contentions of the parties, the following facts are required to be noted and they are that the loan is taken in the year 1985-86 and the petitioners as per their contention have become members of the society in the year 1990, Lavad Suit was filed in the year 1996 and the exparte judgment and award has been passed by the Ld.Nominee. It is the contention of the petitioner that the loan was taken by the Organiser and Developer of the society who had his dummy office bearers, namely Chairman and Secretary of the society and the petitioners are not aware about the same. Further, this court in Spl.C.A.No.8917/97 passed order on 31.1.01 and the relevant part of the same reads as under:

> "However, the petitioner is at liberty to file an Appeal or Revision Application before the Guj.State Coop.Tribunal under the relevant provisions of Gujarat Coop.Societies Act for redressal of its grievance within two weeks from today. In case such an Appeal or Revision is preferred by the petitioner society before the Tribunal, the Tribunal will decide the same on merits and in accordance with law without going into the question of limitation within a period of one month thereafter."

Therefore, it is apparent that the tribunal was directed to decide the appeal/revision, as the case may be, on merits without going into the question of limitation. It is not reported to this court that the order dated 31.1.2001 passed by this court in Spl.C.A.No.8917/97 is reversed or modified by any higher forum.

The contention of Mr.Vakharia that the order dated 31.1.2001 came to be passed by this court in the petition preferred by the society and therefore the petitioners are not entitled to the benefit of the said order can not be accepted because the order came to be passed by this court after hearing the learned counsel for the respondent No.1-Bank. There is nothing to show that the statement made in the petition is incorrect. Not only that but when the society itself is given liberty to prefer appeal or revision I find no

justification for not extending the benefits of the said order to the majority of the members of the society who are directly and vitally affected by the outcome of the proceedings before the Nominee. In any event, such contention is also not raised by the Bank before the Tribunal. Therefore the said contention of Mr.Vakharia fails.

9. In view of the above, it is apparent that this court had given direction to the tribunal to decide the appeal on merits within stipulated period, may be at the instance of the society or otherwise, but the tribunal has not decided the appeal on merits and has rejected the appeal on the ground that the application for leave to defend is not submitted. In any case, upon the perusal of the order passed by the tribunal, it is clear that the proceedings in Spl.C.A.No.8971/97 were brought to the notice and there is also reference. The Tribunal has not distinguished the order, dated 31.1.2001 on the ground that the same was in the petition of the society and not of the petitioners. In that view of the matter, it was highly improper on the part of the tribunal in not deciding the appeal on merits and that too when this court has specifically ordered it for deciding the appeal on merits.

10. So far as the catenation of Mr.Vakharia that there is no privity of contract between the bank and the members of the society are concerned, primafacie, it appears that in every cooperative society the members are not the third party to any litigation of the society, more particularly, when it is for the purpose of recovery of amount from the property of the society which is given by the society to its members for utilisation of their leasehold rights or otherwise. The society if remains lethargic or does not defend the rights properly it can not be said that the members have just to act like silent spectators of the functioning of inefficient or dummy office bearers and have to accept or abide by the order though they have remedy to recourse available under law. In a given case, if the organiser or developer for the reasons best known to them or some office bearers of the society for the reasons best known to them may not to prefer appeal against the award of the Nominee, but if the members of the society who are going to be directly affected by the award of the Nominee, if desire, they have right to prefer appeal on the ground that they are directly aggrieved by the award of the Nominee. In a Housing Cooperative Society, when the members have been allowed to occupy the property and on account of some debt outstanding against the society which is to be

recovered from the property which is under the occupation of the members, it can not be said that the members are not affected or aggrieved by the award of the Nominee. Under the circumstances, I am of the primafacie view that the members of the society can be said to have been aggrieved by the award of the Nominee for the recovery of the amount from the property of the society which is under occupation of the members concerned. In the case before the Supreme Court, i.e. in the case of Daman Singh (supra) the facts were that the society was to be amalgamated under statutory exercise of power and at that stage in a matter of amalgamation the Apex Court observed that the member has no right or individuality to object. In the matter of amalgamation there will be merger of property between two societies and rights and liabilities of such members would be changed and the scheme of amalgamation is required to be approved by the general body and thereafter only there will be exercise of statutory power for grant of sanction and therefore the scheme of amalgamation as per the provisions of the Act is first to be placed before the general body where each member will have the say and then only the decision shall be taken which ultimately will be scrutinised by the authority. When the majority of the general body has agreed for amalgamation, the individual members can not object to the same. Whereas in the present case it is a Housing Cooperative Society where each member is allotted separate plot for the purpose of occupation and upon adjudication before the learned Nominee if the amounts are required to be recovered, the members in occupation will be deprived of the said property and therefore can not be equated with the scheme of amalgamation and therefore I am of the view that the judgment on which the reliance is placed is not applicable to the facts of the present case and is of no help to the respondent No.1-Bank.

11. In Letters Patent Appeal No.190/95 in Spl.C.A.No.3027/91 the facts were that the award of the Nominee was challenged by the society in appeal before the tribunal and the appeal was dismissed by the tribunal and the judgment and award of the Nominee was confirmed. At the stage of execution of award some members preferred Spl.C.A.No.3027/91 and the learned single judge while disposing of the petition observed that first the amount will be recovered from the Chairman and Secretary and the members of the Managing Committee of society holding the post at the relevant time and therefore in that context the Division Bench observed that once the award is there the Bank can not be deprived of the power or authority to recover the loan from the Society by lawful method of

recovery. In the present case, the judgment and award passed by the Nominee is an exparte award and not only that when no appeal is preferred before the Tribunal by the society, the award passed by the Nominee is not confirmed. Moreover, in the present case there is no question of selecting the mode of recovery, but the question is whether the member of the society should be given right to challenge the award if they find that they are aggrieved by the award of the Nominee, more particularly, when the office bearers of the society have not preferred any appeal before the Tribunal. In the case before the Division Bench since the award of the Nominee was confirmed by the tribunal it can not be said that the facts of the present case are similar to that of the facts and circumstances of the case before the Division Bench. However, I can not accept the contention of Mr.Vakharia that the judgment of the Division Bench has to be read for depriving the members of the society who are directly being affected by the judgment and award even for the purpose of depriving of their right to prefer appeal before the higher forum. The judgment of the Division Bench lays down the proposition that when the society had liability to repay the loan amount the bank has power to take appropriate proceedings as permissible under law. I am of the view that the judgment of the Division Bench is on a different facts and proposition and therefore the same is of no help to the respondent No.1-Bank.

12. As regards the judgment in the matter of Rajgor G.V (supra) is concerned, the tribunal has not considered the aspect as to whether the petitioners can be said to be aggrieved by the award or not. Therefore, whether the conditions precedent are satisfied or not is a question which are not decided by the tribunal. In the present case, there was a specific direction of this court to the tribunal to decide the appeal on merits without insisting even the question of limitation and therefore the aforesaid judgment can not be said to be applicable to present case. Even if the principles analogous to the right to prefer appeal under section 96 of C.P.Code are made applicable in the matter of appeal before the tribunal against the judgment and award of the Nominee as observed earlier, the members in a cooperative housing society in the matter of recovery of any loan amount can be said to be aggrieved party when the amount is to be recovered from the property allotted to them, and hence, I am of the view that the aforesaid judgment is of no help to the respondent No.1-Bank.

13. In view of the above discussion, primafacie, I

find that the tribunal was not justified in dismissing the appeal mainly on the ground that no application for leave to prefer appeal is preferred and therefore the appeal can not be decided on merits. In any case, a sound judicial discretion demanded that the tribunal could have given an opportunity to the petitioners to prefer application for leave to prefer appeal and even if the tribunal was of the view that the appeal can not be decided in the absence of application for leave to prefer appeal, same was of no consequence because there was already a specific order of this court dated 31.1.01 in Spl.C.A.No.8971/97 to decide the appeal on merits.

14. In view of the above, I am of the view that the tribunal has not only committed jurisdictional error but also has not observed the sound principles of judicial discipline when this court exercising constitutional powers had given specific direction to decide the appeal on merits it was absolutely improper on the part of the tribunal to say that the appeal can not be decided in the absence of application for leave to prefer appeal and to dismiss the appeal without giving opportunity to the petitioner even to submit the application.

15. In the result, I find that the judgment and order of the tribunal is illegal and deserves to be quashed and hence same is quashed and set aside with further direction that the tribunal shall decide the appeal on merits after giving opportunity of hearing to the parties and such decision shall be rendered preferably within a period of three months from the date of receipt of writ of this court.

16. Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

1.7.2002 (JAYANT PATEL,J)